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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG EDWARD MINAFEE,

Defendant and Appellant.

D073982

(Super. Ct. No. SCD275210)

APPEAL from an order of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed and remanded with directions.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Craig Edward Minafee challenges several conditions of his probation in this appeal. We strike the gang condition, remand with directions to the trial court to modify some other conditions, and affirm in other respects.

BACKGROUND

Minafee was charged with evading an officer while driving recklessly (Veh. Code, § 2800.2, subd. (a), count 1); driving under the combined influence of alcohol and drugs (Veh. Code, § 23152, subd. (g), count 2); and possession of drug paraphernalia (Health & Saf. Code, § 11364, count 3). It was alleged that Minafee had two strike prior convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12)¹; three prison priors (§ 667.5, subd. (b)); and six prior convictions precluding probation (§ 1203, subd. (e)(4)).

Minafee pleaded guilty to evading a police officer while driving recklessly (Veh. Code, § 2800.2, subd. (a)) and to driving a vehicle while under the combined influence of alcohol and drugs (Veh. Code, § 23152, subd. (g)). The People agreed to dismiss the remaining drug-paraphernalia count and all the prior conviction allegations, and to a grant of probation with credit for time served. Minafee agreed that the sentencing judge could consider his prior criminal history and the entire factual background of this case when granting probation or imposing sentence.² The probation officer reviewed the general conditions of probation with Minafee when interviewing him, and Minafee said

¹ Further statutory references are to the Penal Code except when otherwise specified.

² Minafee agreed to waive his rights under *People v. Harvey* (1979) 25 Cal.3d 754.

he understood the conditions and was willing to comply. Minafee, however, had a long history of parole and probation revocations.

At sentencing, counsel for Minafee objected to the electronic and cell phone search conditions and the gang conditions on the ground those conditions had no nexus to this case. Defense counsel said Minafee was 57 years old and had no gang affiliation and no prior convictions that reflected gang affiliation. The People and the probation officer requested that the electronic and cell phone search condition remain because Minafee was in possession of drug paraphernalia and had a history of drug use. The prosecutor pointed out that Minafee had a history of substance abuse, shown through his history and his actions and condition in this case. Drug users often locate narcotics by use of a cell phone, he said. Further, the prosecutor said Minafee was a documented member of a gang, and when asked about his affiliation, Minafee said that he did not take orders from anyone.³ The probation officers had to supervise the "entire individual." The prosecutor argued that the gang condition and electronic and cell phone search condition were appropriate.

The trial court suspended imposition of sentence and placed Minafee on formal probation for five years, with credit for time served. The court imposed conditions of probation judiciously. It reduced all fines to the mandatory minimum and ordered that Minafee pay \$35 per month, instead of the \$50 per month recommended by the probation officer. The court included the search of all electronic devices, cell phones and pass

³ The record states that "Local records indicate the defendant associates with the Emerald Hills Criminal Street Gang."

codes because Minafee had a long history of drug use and abuse. The probation officers needed to be able to monitor Minafee to see if he was complying with the condition not to use drugs. The court imposed the gang condition without response to the objection. It imposed other conditions relating to driving and substance use that were tailored to this crime.

Minafee filed a timely notice of appeal.

DISCUSSION

Minafee challenges several conditions of his probation either as unreasonable under the California Supreme Court standards set out in *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), superseded by statute on other grounds as stated in *People v. Moran* (2016) 1 Cal.5th 398, 403, fn. 6. (*Moran*), or as constitutionally infirm.

A. Guiding Principles

Defendants must object to probation conditions at the time they are imposed. Objections to the reasonableness of a probation condition are forfeited if not raised at the time of imposition. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Minafee objected to the gang condition and electronic search condition and has not forfeited his claims that those conditions were unreasonable as applied to him. Defendants are also obliged to state any constitutional grounds for objections. (*People v. Brandão* (2012) 210 Cal.App.4th 568, 572 (*Brandão*); *In re Sheena K.* (2007) 40 Cal.4th 875, 880–881 (*Sheena K.*)) Minafee did not state constitutional objections to any conditions. A court of appeal may, however, consider constitutional questions that present a pure question of

law, i.e. that can be decided without reference to facts about the defendant or the crime, without objection below. (*Sheena K.*, at p. 887.)

A grant of probation is an act of clemency in lieu of punishment. (*Moran, supra*, 1 Cal.5th 398 at p. 402.) Probation is a privilege, not a right. A court has "broad discretion in fashioning terms of probation in order to foster the reformation and rehabilitation of the offender while protecting public safety." (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 656 (*Arevalo*); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; § 1203.1, subd. (j).)

A condition of probation will be upheld as reasonable if it (1) is related to the crime of which the defendant was convicted, (2) relates to conduct that is criminal, or (3) requires or forbids conduct reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380 (*Olguin*); see *Lent, supra*, 15 Cal.3d at p. 486.) A probation condition will be upheld if it meets any one of the three requirements. (*Olguin*, at p. 379.)

The constitutional rights of probationers are diminished because they have been convicted of crimes. Probations can waive their rights to take advantage of the leniency of probation in lieu of custody. (*Moran, supra*, 1 Cal.5th at pp. 405–406.) " If a probation condition serves to rehabilitate and protect public safety, the condition may "impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' " " (*Arevalo, supra*, 19 Cal.App.5th at p. 656; *In re J.E.* (2016) 1 Cal.App.5th 795, 804 (*J.E.*), review

granted Oct. 12, 2016, S236628.)⁴ "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad," however. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*People v. Acosta* (2018) 20 Cal.App.5th 225, 229 (*Acosta*), review granted Apr. 25, 2018, S247656.) A probation condition is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citations.] (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1196–1197 (*Relkin*); *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

We review the court's imposition of a probation condition under the *Lent* test for an abuse of discretion, and we independently review constitutional challenges to a probation condition. (*Acosta*, *supra*, 20 Cal.App.5th at p. 229, rev. granted.)

⁴ California Rules of Court, rule 8.1115(e)(1) permits use of cases for persuasive value after the Supreme Court has granted review.

B. *Electronic Search Condition*⁵

Probation condition number 6.n. provides that Minafee shall "[s]ubmit person, vehicle, residence, property, personal effects, computers, and recordable media [and] cell phone passcode [and] device to search at any time with or without a warrant, and with or without reasonable cause, when required by P.O. or law enforcement officer." Minafee objected to the electronic and cell phone search conditions, claiming there was no nexus to this case because his crime did not involve his cell phone, text messages, or other electronic devices. The trial court overruled the objection because Minafee had a long history of drug use and abuse. The court said the probation officers needed to be able to monitor Minafee to see if he was complying with the condition not to use drugs.

1. *Reasonable Relation to Future Criminality*

The People do not dispute that the electronic search condition fails the first two *Lent* prongs—the condition has no relationship to Minafee's evasion and reckless driving and driving under the influence offenses, which did not involve the use of any electronic communication system or device including a cellular phone, and the use of electronic devices "is not itself criminal." (See *In re Erica R.* (2015) 240 Cal.App.4th 907, 913; *In re J.B.* (2015) 242 Cal.App.4th 749, 754–755.) Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws

⁵ The issue of the validity of an electronic search condition is pending before our high court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, and in numerous other cases raising this issue.

during the probationary period, a court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. (*Olguin, supra*, 45 Cal.4th at pp. 380–381.) This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." (*Ibid.*) General Fourth Amendment search waivers have been approved as an effective means of "determin[ing] not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant" (*Id.* at p. 382; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67.)

The trial court found that Minafee needed close supervision to maintain his probationary status. Minafee was presumptively ineligible for probation. He had multiple felony convictions spanning more than 30 years, with multiple violations of parole. The trial court did not impose the electronic search condition automatically but considered it in relation to Minafee and his ongoing drug use. Minafee was under the influence of drugs in this case. Cell phones and electronic media may be used to facilitate the purchase of drugs. (See *Acosta, supra*, 20 Cal.App.5th at p. 234, rev. granted [electronics search condition valid to monitor forbidden contacts, even where device not used in the offense]; see *J.E., supra*, 1 Cal.App.5th at p. 806, rev. granted [electronic search condition closely tailored to close supervision of minor with drug, alcohol, and other problems].) The electronics search condition was reasonably related to the prevention of Minafee's drug use and future criminality.

2. *Unconstitutional Overbreadth*

Minafee also contends that the electronic and cell phone search condition is unconstitutional because it is overly broad. We conclude that this condition should be modified to restrict the searches to searches reasonably calculated to reveal material prohibited by law or evidence of illegal conduct, and to further define the areas of the phone or electronic media that can be searched. As so limited, the condition is constitutional.

Minafee relies on *People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*), which found an electronics search probation condition to be constitutionally overbroad because it would permit searches "of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality." (*Id.* at p. 727.) The *Appleton* court relied on the holding of *Riley v. California* (2014) 573 U.S. 373, that cell phone data is subject to Fourth Amendment protection. (*Id.* at p. 401.) The holding of *Riley* is not applicable here because Minafee has agreed to waive his Fourth Amendment right and permit searches of his person, vehicle, residence, property, and electronic devices as a condition of probation.

Probation searches may be conducted to further the rehabilitative and reformatory purposes of probation and other legitimate law enforcement purposes. (See § 1203.1, subd. (j).) "A waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons." (*People v. Bravo* (1987) 43 Cal.3d 600, 610.) Due to the large amount of unrelated data that can be held on a cell phone or other electronic device, and to comply

with the constitutional requirement for a close fit between the legitimate purpose of the restriction and the burden it imposes on Minafee, we remand to the trial court to modify condition 6.n. to restrict the searches of electronic media and cell phones to searches reasonably calculated to reveal material that is prohibited by law or evidence of illegal conduct. The court may also consider limiting the search to particular categories of data that are likely to reveal evidence of drug use or other suspected criminal activity, such as text messages and phone logs. (See *In re Juan R.* (2018) 22 Cal.App.5th 1083, 1094, review granted July 25, 2018, S249256 [electronic search condition search confined to areas "including social media accounts, applications, websites where such evidence of criminality [or] probation violation may be found"].) Medical records and other specific areas may be identified as off-limits.

C. Gang Conditions

The court-imposed gang conditions challenged by Minafee provide as follows:

"12 a. Do not appear in court or at the courthouse unless you are a party or witness in the proceedings. b. Do not associate with any person who you know, or who a [probation officer] or other law enforcement officer informs you, is [an] Emerald Hills gang member. . . . c. Do not knowingly visit/frequent any school grounds unless you are a student registered at the school. . . . d. Do not knowingly be an occupant in a stolen vehicle. e. Do not knowingly display any gang signs or gestures. f. Do not knowingly own, transport, sell, or possess any weapon, firearm, replica firearm or weapon, ammunition, or any instrument used as a weapon. . . . i. Do not knowingly wear, display, use, or possess [any gang paraphernalia]."

We conclude under the facts of this case that the court abused its discretion when it imposed the gang conditions on Minafee. Nothing about the crime was gang-related. No evidence supported a finding that the terms of condition would prevent future criminality, as nothing in his record indicated that he had committed crimes related to or in association with criminal street gangs. The probation officer reported that "[l]ocal records indicate [Minafee] *associates* with the Emerald Hills Criminal Street Gang." The local records are not further described. Minafee denied any affiliation with any gang. When told that information indicated that he associated with a gang, Minafee became angry and said, "I'm 57. No one tells me what to do. I don't take no orders from anyone." This statement can be interpreted in many ways. For example, Minafee may have been expressing his unwillingness to abide by gang rules. His prior record, though lengthy, does not reflect any gang-related crimes. There was no indication of gang tattoos or gang clothing.

Under these circumstances—no gang-related convictions, no gang identification, Minafee's age, lack of nexus to the current crime, no indication of criminality related to gang association—we conclude the gang conditions imposed on Minafee should be stricken from his probation order.⁶ (See *Brandão*, *supra*, 210 Cal.App.4th at pp. 576–577 [no-gang-contact probation condition stricken when defendant had no gang ties; his family had no gang ties; no indication of gang activity in criminal history].)

⁶ In light of our decision, we decline to address Minafee's contention that the prohibition from appearing in court, which was part of the gang condition, was constitutionally overbroad.

D. *Reports of Contact with Law Enforcement*

Minafee contends that condition 6.k, requiring him to report any "contact" with law enforcement to his probation officer is unconstitutionally vague. Condition 6.k requires Minafee to "Provide true name, address, and date of birth if contacted by law enforcement. Report contact or arrest in writing to the P.O. within 7 days. Include the date of contact/arrest, charges, if any, and the name of the law enforcement agency."

Requiring Minafee to report arrests is not vague and is reasonably related to his rehabilitation and the protection of the public. We also conclude that the first sentence, requiring Minafee to provide his personal information to an officer if contacted, is reasonably limited to situations in which the officer requests such information. (See *In re I.V.* (2017) 11 Cal.App.5th 249, 261 [probation condition should be given a reasonable, objective meaning].)

Reporting all "contacts" with officers is more problematical. The court in *Relkin* found a condition of probation required that the defendant report " 'any contacts with . . . any peace officer' " to be vague and overbroad. (*Relkin, supra*, 6 Cal.App.5th at p. 1197.) The court stated that condition " 'does indeed leave one to guess what sorts of events and interactions qualify as reportable.' " (*Ibid.*) It remanded the matter to the trial court to modify the condition to delineate between casual encounters and those that should be reported. (*Ibid.*) The People contend that "the condition sufficiently delineates between casual, random interactions between appellant and a law enforcement officer." We disagree as to the clarity of the condition and remand with directions to the trial court to

either delete or to further define and limit the types of contacts that Minafee must report to his probation officer.

E. Travel Outside San Diego County

Minafee contends that a portion of condition 6.1, requiring him to obtain his probation officer's consent before leaving San Diego County, is overly broad and void for vagueness.⁷ We conclude that *People v. Moran*, *supra*, 1 Cal.5th 398 is dispositive and that this limited travel condition is constitutional.

Minafee has a constitutional right to interstate and intrastate travel, but as with all other liberties, this right may be restricted as a condition of probation. (*Moran*, *supra*, 1 Cal.5th at pp. 405–406.) "[R]easonable and incidental restrictions on [probationers's] movement are permissible." (*Id.* at p. 406.) "Imposing a limitation on probationers' movements as a condition of probation is common, as probation officers' awareness of probationers' whereabouts facilitates supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release." (*Ibid.*)

The requirement for consent before leaving San Diego County is not overbroad. Requiring Minafee to obtain consent before leaving the county is reasonably tailored to supervision and rehabilitation. As noted, Minafee requires a high level of supervision because of his history of multiple crimes and parole violations. We also conclude the condition is sufficiently precise for Minafee to know what is required of him. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) County boundaries are fixed. Minafee could not be

⁷ Minafee does not challenge the portion of the condition that requires him to obtain the court's and probation officer's written consent before moving out of state.

found in violation of his probation for an inadvertent crossing of the county line, as a violation must be intentional. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983.) The requirement that he obtain the probation officer's consent before he leaves San Diego County is neither overbroad nor void for vagueness.

DISPOSITION

We strike the gang conditions listed in paragraph 12. We remand to the trial court to modify condition 6.n. to restrict the searches of electronics and cell phones to searches reasonably calculated to reveal material prohibited by law or evidence of illegal conduct and to consider limiting the search to particular categories of data. We further direct the trial court to delete the word "contact" from the second and third sentences of condition 6.k. or to further define and limit the types of police contacts that Minafee must report to his probation officer. In all other respects, the order is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.